Council for Global Immigration
A SHRM Affiliate

SHRM
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

October 2, 2017

Submitted via e-mail: ETA.OFLC.Forms@dol.gov

Re: Comment Request for Information Collection for Form ETA–9035, Labor Condition Application for Nonimmigrant Workers (OMB Control Number 1205–0310), Revision of a Currently Approved Collection

William W. Thompson II
Administrator, Office of Foreign Labor Certification, Box# 12–200
Employment & Training Administration
U.S. Department of Labor
200 Constitution Avenue NW., Washington, DC 20210

Dear Mr. Thompson:

The Council for Global Immigration (CFGI) and the Society for Human Resource Management (SHRM) are pleased to submit these comments regarding the proposed revisions to DOL Form ETA-9035, Labor Condition Application for Nonimmigrant Workers. We appreciate the opportunity to comment on these revisions.

CFGI, founded in 1972 as the American Council on International Personnel, is a strategic affiliate of SHRM. It is a nonprofit trade association comprised of leading multinational corporations, universities, and research institutions committed to advancing the employment-based immigration of high-skilled professionals. CFGI bridges the public and private sectors to promote sensible, forward-thinking policies that foster innovation and global talent mobility.

Founded in 1948, the Society for Human Resource Management (SHRM) is the world's largest HR professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

Our members appreciate the need for a Labor Condition Application (LCA) as part of the H-1B process, and appreciate that a fair system must adequately protect American workers. At the same time, processes must be efficient and minimally burdensome for employers acting in good faith to comply with laws and regulations. We therefore make the following recommendations regarding the proposed LCA revisions.

I. Do Not Require Employers to Provide Multiple Worksites Within a Single Area of Intended Employment (Section F. Employment and Wage Information)

The LCA provides OFLC with a tool to ensure that H-1B employees do not negatively affect the wages and working conditions of American employees. When completing the LCA, employers provide job titles, SOC (ONET/OES) codes and occupational titles, wage levels, prevailing wages, and place of intended employment, among other information, a make various attestations.

It now appears that DOL will require an employer, when an employee will work at a new place of intended employment within the same area of intended employment (usually the same Metropolitan Statistical Area), to provide multiple worksites even though all other LCA information remains the same. We are concerned that DOL is seeking to implement such a change by amending the form rather than making use of notice and comment rulemaking under the Administrative Procedures Act.

Ultimately, notwithstanding our objection to the process, we recommend that DOL not make this change either by form OR by regulation, as doing so could require new LCAs for worksite changes within an area of intended employment, which can be expensive (often thousands of dollars in filing and legal fees per petition) and burdensome when combined with U.S. Citizenship and Immigration Services' amended H-1B petition requirement.

a. Any change DOL makes to "intended place of employment" should be made by regulation, not by form change.

Prior to the data collection fields in Section F of the form, the following language appears:

> "Each intended place(s) of employment listed below must be *the worksite or physical location where the work will actually be performed* and cannot be a P.O. Box." (Emphasis added)

The form provides a citation to 20 CFR 655.730(c)(5), which states in part that "[a]ll intended places of employment shall be identified on the LCA." The proposed language on the new form appears to create a new definition of "intended place of employment," as "the worksite or physical location where the work will actually be performed," without making the underlying regulatory change.

Contrast the proposed language with the language it replaces on the current version of Form ETA-9035: "The place of employment address listed below must be a physical location and cannot be a P.O. Box." This is a reasonable standard that works with modern business realities: an individual might have their primary desk at one location yet work at multiple actual worksites within a given area of intended employment.

"Area of intended employment" is defined at 20 CFR 656.3 as the "area within normal commuting distance of the place (address) of intended employment." Note that "place" is defined by the parenthetical as "address." We recognize that this is not a very specific definition, but given the commonly accepted practice (by OFLC and employers alike) of providing the primary work address of an H-1B employee within a single area of intended employment, OFLC should not attempt to make a substantially more specific definition simply by changing language on a form.

b. Notwithstanding our objection to the process, we further recommend that DOL not make this change by form OR by regulation, as doing so could require the filing of new LCAs for worksite changes within an area of intended employment.

We respectfully submit that, regardless of DOL process, employers should not be required to provide "the worksite or physical location where the work will actually be performed" in cases where an employee might be performing work at several physical locations within a single area of intended employment. In many cases, employers have an employee working at many locations within a single area of intended employment (for instance, a large multinational organization might have several office locations in a single city – 123 XYZ Street in New York City, 456 XYZ Street in New York City, 789 ABC Avenue in New York City, and so on).

We fear that, with this specific definition of "intended place of employment" on the form, OFLC will specify that employers must file new LCAs for work at a new worksite not listed on a prior LCA, even if the area of intended employment was covered by a prior LCA (for instance, when an LCA is filed for the employee in the example above is filed for 123 XYZ Street but, because of remodeling an office space or because the employer's campus contains multiple addresses in the intended place of employment, ends up performing the same duties for the same company across the street at 456 XYZ Street). Even if OFLC does not specifically opine on this, employers may feel compelled to file a new LCA in such a situation out of an abundance of caution to ensure compliance.

Another example is for faculty positions at universities. The actual physical place in which a faculty member teaches (a.k.a. particular building or classroom) changes every semester and assignments are often set right before each semester starts. Universities simply do not know at which street address on campus these employees will conduct their teaching duties in each semester during the requested H-1B period. The new filing requirements could make it difficult for employers to file LCAs for these types of positions at all.

Filing a new LCA is not a trivial matter for employers, as U.S. Citizenship and Immigration Services (USCIS) now generally requires, per *Matter of Simeio Solutions, LLC,* that employers file an amended H-1B petition any time a new LCA is filed.[1] This is expensive (often thousands of dollars in filing and legal fees per petition), time consuming, and burdensome. DOL should not unnecessarily contribute to this expense and burden. Instead, we recommend that DOL retain the language on the current version of Form ETA-3095.

[1] https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf. While this guidance states that a move within an area of intended employment is not one for which an amended H-1B petition is required, the justification given by USCIS for this is that "[i]f a petitioner's H-1B employee is simply moving to a new job location within the same area of intended employment, a new LCA is not generally required." If OFLC requires new LCAs for each new worksite or physical location where work will be performed, even within the same area of intended employment, it appears USCIS might reconsider its position.

II. Reconsider use of the phrase "secondary employer" as the H-1B petitioner is ultimately the employer (Section F. Employment and Wage Information)

The term "secondary employer" is highly problematic as it appears to imply that the recipient of the end services of a service provider is a "secondary employer" even though the primary employer filing the LCA retains the ability to set wages, working conditions and the ability to hire and fire, etc.

Ultimately DOL should consider the full impact of the new requirement to list the name of the employer at whose worksite the work will be performed, as small changes in company name or addresses again might make employers feel compelled to file new LCAs and amended petitions at USCIS despite none of the other underlying facts in the LCA changing. It ultimately might be less burdensome for the agency and all involved to eliminate the new reporting requirement altogether.

CFGI and SHRM thank DOL for continued opportunities to comment on issues of such critical importance to U.S. employers. We would be pleased to provide additional information and feedback at any time.

Sincerely,

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Nancy Hammer
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